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No. 73-1325

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In the Supreme Court of the United States

OCTOBER TERM, 1973

SALVATORE MONTELLO, JOHN FRANCIS RIPOLL, JAMES VINCENT SANTA MARIA, RONALD JAMES DE CONZA, and ANTHONY FASANELLA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The order of the court of appeals (Pet. App) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1974. The petition for a writ of

certiorari was filed on February 28, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the testimony of two government witnesses should have been stricken because they failed to recognize that they would be "punished * * * by the Lord" if they lied.

2. Whether the prosecutor's summation was so inflammatory and prejudicial as to deny petitioners a fair trial.

3. Whether the actions of United States Marshals guarding the key government witnesses prejudiced petitioners by enhancing the witnesses' credibility.

4. Whether the district court properly cautioned the jury as to the possible unreliability of accomplice testimony.

5. Whether the district court erred in allowing rebuttal evidence concerning government witnesses' fear for their own personal safety.

6. Whether petitioner Fasanella was denied the right to a full and complete summation.

7. Whether alleged character evidence relating to petitioner Montello, who did not offer testimony in his own defense, was improperly admitted.

8. Whether the district court erred in denying petitioner Montello's motion to exclude evidence of a prior conviction if he should testify.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted on three counts of an indictment charging burglary and conspiracy, in violation of 18 U.S.C. 371 and 2113(a). Petitioners Ripoll, Santa Maria, De Conza, and Fasanella were sentenced to five years' imprisonment on each count, the sentences to run concurrently. Petitioner Montello was sentenced to five years' imprisonment on counts one and three, and seven and one-half years' imprisonment on count two, the sentences to run concurrently. All petitioners' sentences were subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2).[1]

1. Evidence at trial showed that a branch of the Manufacturers Hanover Trust Company bank in Queens, New York, was burglarized on December 12, 1971. The burglary was discovered the next morning, when the assistant manager and a guard found that a large hole had been burned through the night deposit vault, the alarm system had been circumvented, and a small fire had occurred. The circumstances surrounding the burglary and theft of more than $130,000 from the vault suggested a well-organized, professional theft (Tr. 283-288, 308-312.)

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[1] Codefendant Robert Bollella was acquitted on count one of the indictment (conspiracy) and convicted on count four of the indictment, charging knowing and unlawful possession of $14,000 of the proceeds from the burglary. Codefendant Louis Montello was severed from the case when he became ill on the first day of trial (Tr. 367-372, 410-416, 429-430).

Seven months later, after he was implicated in another burglary, Robert Denisch, an employee of Holmes Protection, Inc., confessed to participation in this burglary. A former Holmes employee, Dennis Condon, made a similar confession a week later (Tr. 717-728, 763, 1935, 1943). Denisch and Condon agreed to cooperate with the government and testify against the codefendants in this case.

There were no non-accomplice witnesses to the burglary. The government's case against petitioners, consisting largely of the testimony of Denisch and Condon, showed that after an earlier series of burglaries not involving petitioners, Denisch and Condon, whose expertise in circumventing Holmes alarm systems made the burglaries possible, sought the advice of defendant Bollella as to engaging the services of a different burglary gang. Bollella arranged to introduce Condon to "Sonny Black" (petitioner Montello), and to vouch for Condon. (Tr. 340-360, 460-472, 1507-1509.)

According to the testimony, Montello subsequently met with Condon and Denisch. After satisfying himself as to their ability to defeat the alarm, Montello offered the services of his "crew," and discussed potential burglary targets and arrangements for splitting burglary proceeds. Petitioners Santa Maria and Ripoll arrived during the discussion and were introduced by Montello as his "two partners" (Tr. 480, 1509-1517, 1605-1606).

After making painstaking preparations for the venture, the group attempted a burglary of the Man-

ufacturers bank in early December 1971. Fearing their entry had been detected, the plan was aborted. One week later, Montello, De Conza, Santa Maria, Ripoll, Denisch, and Condon proceeded to the bank. On Montello's instructions, Santa Maria and Ripoll tried in vain to open the bank's rear door. De Conza then succeeded in opening it; he then entered the bank with Denisch, who disengaged the alarm system. After waiting long enough to assure that the entry had not been detected, Montello summoned Fasanella, who arrived within fifteen minutes (Tr. 582-585, 1591, 1605-1614).

Montello, Fasanella, and De Conza unloaded acetylene tanks from Condon's car. Denisch, Fasanella, De Conza, and Santa Maria entered the bank, while Ripoll, Condon, and Montello remained outside. Fasanella and De Conza burned a hole in the vault and, after extinguishing a small fire, removed the money bags and their equipment (Tr. 585-587, 1614-1619). The group proceeded in two cars to the home of petitioner Montello's brother Louis, where the proceeds were divided [2] (Tr. 589-591, 1621-1632).

2. Since the government's case was based in large part on the testimony of Denisch and Condon, the defense undertook an extensive assault on the credibility of these witnesses. Condon was cross-examined

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[2] The shares of Denisch and Condon were parcelled out in installments, apparently out of fear that their possession of large sums, and lavish spending, would draw suspicion to the gang. Neither ever received his full share of the proceeds. (Tr. 590-591, 656-677, 682, 1631-1668.)

for five days (Tr. 747-1454), Denisch for three days (Tr. 1733-2266). In their own behalf petitioners Montello, Santa Maria and Ripoll called various witnesses in support of their alibi defenses. Petitioner Fasanella contended that he was the victim of a deliberate false identification, and that the actual participant was a Frank Mele, who resembled Fasanella physically and had a similar description in F.B.I. reports (Tr. 1238-1242, 2240-2245, 2561, 2566).[3]

ARGUMENT

1. Petitioners contend that the trial court should have stricken the testimony of the principal prosecution witnesses, Denisch and Condon, as unsworn. At issue is the witnesses' reluctance to state, on cross-examination, that they feared immediate divine reprisal if they should fail to tell the truth (Tr. 1138-1140, 2180-2182).[4]

While unsworn testimony is not admissible (see *United States* v. *Fiore*, 443 F. 2d 112, 114-115 (C.A. 2)), mere nonbelief in a deity does not render a witness incompetent to testify (*Gillars* v. *United States*, 182 F. 2d 962, 970 (C.A. D.C.)). Nor is a witness disqualified from testifying for failure "to invoke the belief as to divine retribution to follow false swearing as an inducement to tell the truth."

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[3] Codefendant Bollella, not a petitioner herein, testified in his own defense, and on cross-examination admitted being Montello's business partner in the venture (Tr. 2926-2927).

[4] Pertinent excerpts from the cross-examination are set out at Pet. 6-8.

United States v. *Looper*, 419 F. 2d 1405, 1406, n. 2 (C.A. 4). So long as witnesses evidenced a sincere compulsion to tell the truth—which Denisch and Condon did—their testimony was not subject to exclusion. *United States* v. *Looper*, *supra;* 6 Wigmore, *Evidence*, § 1818 (3d ed.).[5]

2. Petitioners argue that the prosecutor's summation was so inflammatory and prejudicial as to deny them the right to a fair trial. Viewed against the totality of this lengthy and complex trial, the handful of isolated comments alleged to be improper lose their significance. Certainly the comments complained of in the petition (at 17-20) do not warrant reversal under the most stringent tests of fairness.

Following more than a day of defense summations which were punctuated by broadside attacks on the integrity of the government's witnesses and the prosecutor,[6] and appeals to the jurors' emo-

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[5] While this Court has intimated that the mere swearing of allegiance *pro forma* by one who disagrees with or is indifferent to the solemnity attached to an oath, may not satisfy a state's interest in ensuring undivided allegiance on the part of its legislators, *Bond* v. *Floyd*, 385 U.S. 116, 132, or members of the bar, *In re Griffiths*, 413 U.S. 717, 726, these principles do not render the testimony inadmissible in this case, when the witnesses made clear that they intended to testify to the truth.

[6] Denisch and Condon were referred to in defense summations as, *inter alia*, "moral lepers," "liars," "thieves," "neurotic," "psychotic," persons who "sold their souls for their freedom." (Tr. 3156, 3159, 3398.) The prosecutor was accused, among other things, of trying to convict petitioners so he could record them "on a chart in his office," of deliber-

tions,[7] the prosecutor initially sought to emphasize to the jury that they should take into account the public interest in rendering a guilty verdict should they be convinced on the evidence of the petitioners' guilt beyond a reasonable doubt. Upon objection by the defense, the court told the jury they would be instructed on these matters at the close of the case.[8] Thereafter, the prosecutor argued to the jury the reasons why they should believe Denisch and Condon, and indicated the inherent difficulty in proving a burglary committed without independent witnesses.

In none of the statements cited by petitioners did the prosecutor make himself a witness by introducing testimony not of record. In sum there was no prosecutorial conduct which would warrant reversal.

3. Petitioners contend that the actions of United

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ate fabrication, and of withholding evidence (Tr. 3160-3162, 3169, 3175-3176, 3415.)

[7] The trial transcript abounds with emotional appeals to the jury. For instance, Bollella's attorney concluded his summation by stating (Tr. 3193): "Let Robert Bollella leave this courthouse, go home to his family, let him resume his police career, let him marry Helen Preston." Nor did the defense miss any opportunity to inject into closing arguments its own appeals to patriotism (Tr. 3153) or community interest (Tr. 3434-3436).

[8] Later the court instructed the jury (Tr. 3523): "The case is important to the Government, since the enforcement of the criminal laws is required in the public interest. Obviously, it is equally important to the defendants, who are charged with a serious crime. Let me add: The fact that the Government is a party entitles it to no greater consideration than that accorded to any other party to a litigation. By the same token, it is entitled to no less consideration."

States Marshals prejudiced them by lending credibility to the principal government witnesses, Denisch and Condon, who had been in protective custody throughout the trial. A procedure had been established whereby the witnesses would enter and leave the courtroom in the jury's absence, accompanied by the marshals, who sat inconspicuously in the public area of the courtroom during the trial.

This procedure worked without incident until the thirteenth day of trial, when upon concluding the redirect examination of Denisch, the prosecution, about to rest its case, excused the witness, who exited through a nearby door into the detention cell, and was followed by the marshals, in the presence of the jury (Tr. 2481). To have followed the established procedure would have required the jury to leave the courtroom while Denisch was escorted out, then return only to hear the prosecutor announce that he was resting the government's case, then again be discharged while the court heard the usual motions. We submit that such a procedure, far from preventing the error now complained of, would have equally called the jurors' attention to the fact that Denisch was in protective custody.

After the jury was excused defense counsel moved for a mistrial, charging that the marshals had created in the juror's minds an "aura" that Denisch was "still in danger" from the defendants, and that the incident had been deliberately contrived by the government (Tr. 2477-2480). Although the court and the prosecutor agreed that the incident was unfortunate,

neither could accept the charges of evil motive by defense counsel. We submit that no prejudice to petitioners was shown, and that the court properly declined to grant a mistrial.

4. Petitioners next urge that the trial court, in its instructions to the jury, gave unwarranted sanction to the testimony of petitioners' accomplices who testified for the government. In pertinent part, the court charged the jury (Tr. 3559-3560):

> Condon and Denisch are self-confessed criminals, informants and accomplices in the commission of the crimes with which the defendants on trial are charged. An accomplice is one who willfully associates himself with the commission of a crime.
>
> The law does not prohibit the use of self-confessed criminals and whether you approve or disapprove of their use is not to enter into your consideration of this case. In certain types of crime the Government, of necessity, is frequently compelled to rely on the testimony of self-confessed criminals, informants, or accomplices. Otherwise, it would be difficult to detect or prosecute some wrongdoers and this is particularly true in a conspiracy-burglary case. The Government often has no choice in the matter. It must take the witnesses to the transactions as they are.
>
> There is no requirement that the testimony of a self-confessed criminal or accomplice be corroborated by other evidence.
>
> A conviction may rest on the uncorroborated testimony of such witnesses if it is found credible and reliable. The testimony of these witnesses

> may be accepted or rejected in whole or in part as you see fit.
>
> * * * * *
>
> However, the testimony of such witnesses should be viewed with great caution and scrutinized with care, and you should consider their criminal background carefully as bearing on their credibility.

We submit that the jury was properly cautioned as to the potential unreliability of accomplice testimony,[9] that the instruction properly stated the law and met accepted standards on accomplice testimony. See, *e.g.*, *United States* v. *Willis*, 473 F. 2d 450, 454 (C.A. 6); *United States* v. *Curry*, 471 F. 2d 419 (C.A. 5); *United States* v. *Corallo*, 413 F. 2d 1306, 1322-1323 (C.A. 2); *Hanger* v. *United States*, 398 F. 2d 91, 108 (C.A. 8); *cf. Caminetti* v. *United States*, 242 U.S. 470, 495.

5. Petitioners contend that the trial court erred in admitting testimony relating to Denisch's fear for his personal safety and codefendant Bollella's statement to police officers that fear was a reason for his unwillingness to cooperate with the government. These claims have no basis.

Following his arrest and agreement to cooperate with the government, Denisch was placed in the gov-

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[9] Moreover, nearly eight days of trial were consumed by cross-examination of the chief government witnesses (Tr. 747-1454, 1733-2266), in which massive assaults on the witnesses' credibility were undertaken by defense counsel which, we submit, indelibly impressed upon the jury the reasons why the defense urged it to disbelieve their testimony.

ernment's witness security program, and resided in a Topeka, Kansas motel (Tr. 2410-2420). Following an incident in which an individual apparently from New York inquired about his motel room (Tr. 2420-2421), Denisch believed himself in great danger. He contacted a former associate, Joey Brewster, and told him that his agreement to testify for the government had been coerced, that he was prepared to change his testimony, and that he intended to make out a defense of mental incompetency (Tr. 2266, 2419-2426).

Accompanied by Brewster, Denisch and his family returned to New York, where Denisch advised the United States Marshals Service that he had become fearful because of the inadequate protection afforded him in Topeka. Assured of greater security, Denisch decided to continue to cooperate with the government (Tr. 2425-2427).

On cross-examination defense counsel sought to impeach Denisch partly on the basis of his statements to Brewster, a neurologist in Topeka, and an assistant United States Attorney in New York during this period. To meet the impressions created by this cross-examination, the government offered on redirect examination testimony explaining the circumstances under which Denisch had made the foregoing statements (Tr. 2408-2427). The court advised the jury that such testimony was being offered not to prove the truth of what was said, but merely as evidence bearing on the witness's state of mind (Tr. 2417-2419). This was entirely proper in the circumstances.

Petitioners also attack the admission of Detective James Rooney's testimony that codefendant Bollella had told him he had considered cooperating with the government, but had decided against it since "I'd rather be alive in jail than dead on the street" (Tr. 3020). This statement, admitted as part of the government's rebuttal case, was offered to rebut the suggestion, introduced by Bollella in his defense, that the government had attempted to importune him into giving false evidence in support of Denisch and Condon (Tr. 2815-2819, 2826-2840).[10] After extensive colloquy at side bar, the court ruled Rooney's testimony concerning this matter admissible, since the proffered testimony bore directly on the veracity of Bollella's claim that he had refused to cooperate because he would not become "a party to a fabricated case" (Tr. 2981-2993). This, we submit, was within the proper scope of rebuttal, and was properly admitted.

6. Petitioner Fasanella contends that the trial court abused its discretion by limiting his counsel's summation—which followed five separate defense summations which had consumed most of two days of trial—to one and one-quarter hours, since respective counsel for the codefendants had agreed among themselves

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[10] After consulting the court, through counsel, as to the scope of the government's rebuttal case (Tr. 2788-2797, 2805-2811), Bollella testified that he had resisted governmental overtures to cooperate, and that he had stated to Detective Rooney: "Anything that I would have to say in this case would have to be a lie. I know nothing about it. I don't even know the other defendants involved in the case" (Tr. 2841).

that Fasanella's counsel would serve as "anchorman" for all. The argument is without merit.

When on the first day of summations, counsel for petitioner Montello advised the court that "counsel have made some arrangements as to the order of summation" and that he "assume[d] there [would] be no problems as far as anyone is concerned * * * " (Tr. 3091), counsel for Fasanella kept silent. When later that day counsel for petitioner Santa Maria and De Conza also made reference to private discussions among defense counsel (Tr. 3137-3139), Fasanella's attorney once more said nothing about his role as "anchorman." Twice during the colloquy Judge Neaher remarked that he anticipated defense summations to be approximately 45 to 60 minutes each. No objection was made, and thereafter all counsel did in fact limit their summations to not more than one and one-quarter hours each. Throughout this time Fasanella's counsel made no effort to request additional time and said nothing to the court about the purported agreement among counsel. Under these circumstances, petitioner's claim of "surprise" is unfounded, and no complaint should be heard that he was denied a fair opportunity on summation. See *Capriola* v. *United States*, 61 F. 2d 5 (C.A. 7), certiorari denied, 287 U.S. 671. In short, it was not improper for the court to restrict counsel for Fasanella to the same time as was afforded his codefendants' counsel and to the government.

7. Petitioner Montello contends that he was deprived of a fair trial by testimony allegedly elicited

by the prosecutor in order to attack his character, although Montello neither testified nor produced character witnesses.

Two instances of prosecution questioning of Dennis Condon are cited as damaging to Montello. First, Condon testified, over defense objections, that codefendant Bollella was looking for "people who I believed engaged in burglaries" who could open "a safe or a vault" (Tr. 350), and that during one such conversation he had asked Bollella to introduce him to petitioner Montello (Tr. 366, 460-461). This line of testimony was designed to clarify for the jury the relationship among Condon, Bollella, and Montello, and was crucial evidence as to the formation and organization of the conspiracy. That Condon was actively seeking, through Bollella, to engage persons willing to commit burglaries could not have been excluded without emasculating the proof of formation of the conspiracy. See *United States* v. *Pfingst*, 477 F. 2d 177, 194 (C.A. 2), certiorari denied, 412 U.S. 941.

On cross-examination Montello's counsel asked Condon whether at the time of the burglary he considered himself "an honorable man"; Condon replied that he considered himself an "honorable man * * * [or] a reasonable facsimile thereof" (Tr. 1181-1185). On redirect the prosecutor sought to afford Condon an opportunity to clarify his answers. Condon testified (Tr. 1401) that he considered himself a "reliable individual who could be trusted and relied upon by friends" for assistance. The prosecutor sought to elicit by a question that it was Bollella, a friend, who

vouched for Condon to Montello, but a defense objection to the question was sustained and it was withdrawn; the jury was instructed to disregard it (Tr. 1402).

Montello's claim that the question was prejudicial is ill-founded, since from Condon's prior testimony the jury was already aware that Bollella had "vouched for" Condon to Montello (Tr. 460-472). In any event, the instruction was adequate to cleanse from the jurors' minds any prejudicial implications; see, *e.g.*, *United States* v. *Jiminez-Badilla*, 434 F. 2d 170, 174 (C.A. 9).

8. Petitioner Montello contends that the district court erred in ruling that if petitioner testified in his own defense it would not prohibit the use in cross-examination of Montello's prior state conviction for unlawful entry. He urges that the prior offense did not involve moral turpitude and was too remote in time.[11] The contention is insubstantial.

The crime of unlawful entry, a misdemeanor under New York law, does involve moral turpitude. *De*

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[11] The earlier offense occurred in May 1962, nine and one-half years prior to the instant burglary. Petitioner was originally tried and convicted for attempted burglary in the third degree and possession of burglary instruments. Following discovery that some of the jurors had made an unauthorized visit to the scene of the crime, the convictions were reversed. See *People* v. *DeLucia*, 15 N.Y. 2d 294; *United States ex rel. DeLucia* v. *McMann*, 373 F. 2d 759 (C.A. 2); *People* v. *DeLucia*, 20 N.Y. 2d 275. In 1967 Montello pled guilty to the crime of unlawful entry in satisfaction of the outstanding charges against him, and was sentenced to time already served.

Bernardo v. *Rogers*, 254 F. 2d 81, 82 (C.A. D.C.). Nor was the conviction too remote. Indeed, as measured by the proposed Rules of Evidence, § 609(b), the conviction fell within the limit of ten years from release from custody or control (in this case, Montello was released from custody or control in December 1967, just four years prior to the offense at bar).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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END OF CASE

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